

The court incorporates by reference in this paragraph and adopts as the findings and orders of this court the document set forth below. This document has been entered electronically in the record of the United States Bankruptcy Court for the Northern District of Ohio.



Dated: April 07 2006

A blue ink signature of Mary Ann Whipple, written in a cursive style.

Mary Ann Whipple
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:)	Case No. 05-76212
)	
Michael D. Schuler,)	Chapter 7
Amanda S. Schuler,)	
)	
Debtors.)	JUDGE MARY ANN WHIPPLE

ORDER GRANTING MOTION TO VACATE ORDER FOR REDEMPTION

The matter before the court is a Motion to Vacate Order for Redemption (“Motion”) [Doc. # 15] filed by General Motors Acceptance Corporation (“GMAC”). The Motion raises the issue of the proper service of Debtors’ Motion for Redemption. After reviewing the Motion and considering the arguments of counsel, the court will grant GMAC’s Motion.

FACTUAL BACKGROUND

On October 15, 2005, Debtors filed for relief under Chapter 7 of the Bankruptcy Code. Thereafter, Debtors filed a motion under 11 U.S.C. § 722 for redemption of a motor vehicle, which was financed by GMAC and on which GMAC holds a lien. Debtors served the motion for redemption on GMAC by regular mail at a P.O. Box in North Olmsted, Ohio. The court set January 20, 2006, as the deadline for filing a response to the motion and the clerk sent notice of the response deadline by first class mail to GMAC at the same address. [Doc. # 12]. GMAC did not file a response to the motion for redemption. And on January 23, 2006, the court entered an order granting the motion. [Doc. # 14]. On January 26, 2006, GMAC’s counsel filed a notice of appearance and request that all notices be sent to its counsel. [Doc. # 16]. On that

same date, the court served notice of its order granting the motion for redemption. As a result, GMAC's counsel received notice of the court's order and, also on January 26, filed the motion now before the court to vacate the redemption order. The sole basis for GMAC's motion is that, by not serving its statutory agent, Debtors failed to properly serve it with the motion for redemption.

LAW AND ANALYSIS

Rule 60(b) of the Federal Rules of Civil Procedure, made applicable to this case by Rule 9024 of the Federal Rules of Bankruptcy Procedure, provides that "[o]n motion and upon such terms as are just, the court may relieve a party. . . from a final judgment, order, or proceeding" for any one of six different reasons. GMAC does not specify under which subsection of Rule 60(b) its motion is being brought. However, its argument raises issues under Rule 60(b)(4), which provides for relief from a judgment if "the judgment is void." The court, therefore, construes the motion as brought under Rule 60(b)(4).

"A judgment is void under 60(b)(4) 'if the court that rendered it lacked jurisdiction of the subject matter, or of the parties, or if it acted in a manner inconsistent with due process of law.'" *Antoine v. Atlas Turner, Inc.*, 66 F.3d 105, 108 (6th Cir. 1995) (citing *In re Edwards*, 962 F.2d 641, 644 (7th Cir. 1992)). Under such circumstances, "it is a *per se* abuse of discretion for a district court to deny a movant's motion to vacate the judgment under Rule 60(b)(4)." *Id.* (citing *In re Edwards*, 962 F.2d 641, 644 (7th Cir. 1992)).

By arguing that it was not properly served with Debtor's Objection, National City argues, in effect, that the court's judgment is void for lack of personal jurisdiction. Addressing a court's exercise of personal jurisdiction over a party, the Supreme Court explained as follows:

"The requirement that a court have personal jurisdiction flows not from Art. III, but from the Due Process Clause.... It represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty."

. . . .

Before a federal court may exercise personal jurisdiction over a defendant, the procedural requirement of service of summons must be satisfied. "[S]ervice of summons is the procedure by which a court having venue and jurisdiction of the subject matter of the suit asserts jurisdiction over the person of the party served." . .

Omni Capital Intern., Ltd. v. Rudolf Wolff & Co., Ltd., 484 U.S. 97, 104 (1987). Citing *Omni Capital Intern.*, the Sixth Circuit found that even actual knowledge of an action does not substitute for proper service of process under Rule 4 [of the Federal Rules of Civil Procedure] and does not cure a technically defective service of process. *Friedman v. Estate of Presser*, 929 F.2d 1151, 1155-56 (6th Cir. 1991); *see also LSJ Investment Co. v. O.L.D., Inc.*, 167 F.3d 320, 322 (6th Cir. 1999)(stating that the court "will not allow actual knowledge of a lawsuit to substitute for proper service under Fed. R. Civ. P. 4"). "Due to the integral

relationship between service of process and due process requirements,” the court concluded that “the requirement of proper service of process ‘is not some mindless technicality.’” *Friedman*, 929 F.2d at 1156 (quoting *Del Raine v. Carlson*, 826 F.2d 698, 704 (7th Cir. 1987)).

In determining whether GMAC was properly served with Debtors’ motion for redemption, the court considers Bankruptcy Rules 6008 and 9014. Rule 6008 provides that “[o]n motion of the debtor, . . . and after hearing on notice as the court may direct, the court may authorize the redemption of property from a lien” The Advisory Committee Notes make clear that “[t]he rule . . . applies to a debtor exercising a right of redemption pursuant to § 722” and that “[a] proceeding under that section is governed by rule 9014,” a rule governing contested matters. Fed. R. Bankr. P. 6008, Advisory Committee Notes; *see also In re White*, 231 B.R. 551, 554 (Bankr. D. Vt. 1999) (stating that “[u]nder rule 6008, redemptions are Contested Matters”); *In re Groth*, 269 B.R. 766, 767 (Bankr. S.D. Ohio 2001) (finding a motion to redeem was a contested matter) .

Under Rule 9014, Debtors were required to serve their motion “in the manner provided for service of a summons and complaint by Rule 7004.” Fed. R. Bankr. P. 9014(b). While neither *Friedman* nor *LSJ Investment Co.* cited above specifically address Rule 7004 of the Federal Rules of Bankruptcy Procedure, and a summons is not required to accompany the motion, the basis for the courts’ holdings is equally applicable. The heightened service of process requirements of Rules 9014 and 7004 are particularly appropriate under such circumstances as are presented in this case where a debtor seeks an order fixing the property rights of a creditor in collateral securing a debt owed to the creditor and the notice periods are necessarily short.

Rule 7004(b)(3) provides for service by first class mail upon a corporation, such as GMAC, “by mailing a copy of the summons and complaint to the attention of an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process. . . .” Although GMAC argues that proper service on a corporation requires service on its statutory agent, Rule 7004(b)(3) is not so restrictive, as it also permits service on an officer or a managing or general agent. Nevertheless, Debtors did not serve their motion to redeem in accordance with Rule 7004(b)(3). Instead, they sent their motion by regular mail addressed only to GMAC without further specifying any individual to whom it should be delivered. Such service does not satisfy the requirements for proper service under Rule 7004(b)(3), *see Beneficial California, Inc. v. Villar (In re Villar)*, 317 B.R. 88, 93 (B.A.P. 9th Cir. 2004) (service of motion to avoid lien on corporation without specifying an individual or even an office is insufficient under Rule 7004(b)(3)), nor does it satisfy the due process requirement of notice that is

“reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections,” *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 309, 314 (1950).

Debtors argue that service was proper since they served GMAC at the address it provided to credit reporting agencies under “Creditor Contact Information.” [See Debtor’s Response to GMAC’s Motion, Ex. B]. However, the due process concerns underlying the rules governing service are not necessarily the same as concerns a creditor might have in providing contact information to a credit reporting agency. Debtors also argue that GMAC was given and long had proper notice of commencement of the Chapter 7 case under Rule 2002. The court agrees. However, such generalized notice at the outset is not a substitute for the heightened service requirements in specific contested matters involving a particular creditor and its property rights. As such, the court finds Debtors’ arguments without merit.

Accordingly, the court finds that its January 23, 2006, order granting Debtors’ Motion for Redemption is void under Rule 60(b)(4) because the court lacked personal jurisdiction over GMAC and because the court’s order was entered in a manner inconsistent with due process of law.

THEREFORE, for the foregoing reasons, good cause appearing,

IT IS ORDERED that GMAC’s Motion [Doc. # 15] be, and hereby is, **GRANTED**; and

IT IS FURTHER ORDERED that the court’s Order for Redemption [Doc. # 14] be, and hereby is, **VACATED**; and

IT IS FURTHER ORDERED that GMAC is granted until **April 19, 2006**, to file its response to Debtors’ Motion for Redemption. GMAC’s failure to file a response by said date will result in the court granting Debtor’s motion.